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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 51

DETROIT INTERNATIONAL BRIDGE COMPANY,
APPELLANT,

vs.

CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN

Appeal from the Supreme Court of the State of Michigan.

REPLY BRIEF OF DETROIT INTERNATIONAL BRIDGE COMPANY

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Because counsel for appellee cite authorities involving taxes and issues of a nature so materially different from those here involved, it becomes necessary to briefly re-state appellant's position, and to point out wherein the authorities cited by appellee have no application to the case at bar.

There is no contention made by appellant or appellee that the tax here involved is in the nature of or in lieu of a direct property tax. To the contrary, both litigants have referred the court to various Michigan authorities which have expressly stated "that this is not a property

tax, but is a tax on the franchise of the corporation to do business within the state." It is important to point out to the court that the Detroit International Bridge Company, the appellant, is subject to and has each year since its existence paid to the City of Detroit, to the County of Wayne and to the State of Michigan a direct real property tax covering that portion of its property located within the City of Detroit, in the County and State (in accordance with the provisions of Sections 1 and 2 of Act 206 of Public Acts of Michigan of 1893, as amended, 1 Compiled Laws of Michigan of 1929, Sections 3389 and 3390). The property tax paid by the appellant Bridge Company to the City, State and County for the year of 1931 amounted to $139,026.95 and the yearly property tax assessed against it is approximately for the same amount.

Counsel for appellee have cited such cases as *Fargo v. Hart*, 193 U. S. 490; *East St. Louis Ry. Co. v. Missouri*, 256 U. S. 314; *United States Express Co. v. Minnesota*, 223 U. S. 335. Those cases involve the imposition of a direct property tax upon a corporation in which the property subjected to the tax is used in interstate commerce. We are quite in accord with the doctrine of those cases, that is, that the property of a foreign corporation located within a state may be subject to a property tax, generally assessed against property of all persons or corporations, even though that property be used in interstate or foreign commerce. The appellant, Detroit International Bridge Company, is subject to and each year pays such a tax and we are not here contesting the validity of the imposition of such a direct property tax.

Nor is the tax in the case here involved imposed in lieu of a property tax, as was that imposed in the case of *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, cited by appellee. In that case, under the very language of the

taxing statute, the act provides that the annual excise tax "for the privilege of exercising its franchises within this state, which, with the tax provided for in Sec. one, *shall be in lieu of all taxes upon such railroad company, its property and stock.*" See *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 658. If the tax here involved were imposed upon the appellant Bridge Company in lieu of a direct tax upon that portion of its property located within the state, then the doctrine of the *Maine v. Grand Trunk Ry. Co.* case, *supra*, might be employed.

Nor is the case of *Postal Telegraph & Cable Co. v. Charleston*, 153 U. S. 692, 700, cited by appellee applicable. In that case the court sustained the right of the City of Charleston to impose a small license tax on business purely local in character, in no way intended to cover interstate or foreign commerce upon the theory that the Federal Government cannot prohibit a State from regulating purely local business which is solely within the province of the State to regulate, any more than a State can regulate or tax purely interstate or foreign commerce which is solely subject to the control of the Federal Government. It is our contention in the case at bar that the tax here involved is for the privilege of doing business as a corporation, and that because the appellant does no intrastate business and is engaged exclusively in foreign commerce, and under its corporate charter has no power to engage in business other than this foreign commerce, that the tax, insofar as its application to appellant is concerned, is unconstitutional.

The case of *Hump Hairpin Co. v. Emerson*, 258 U. S. 290, involves a question not here before the court. In that case a state imposed an annual franchise fee upon a corporation which was engaged in both inter and intrastate business. The court in that case pointed out that the state had only attempted to impose a privilege tax

upon the intrastate business as distinguished from the interstate business, and the rule was announced that although property used without the state formed a part of the formula, the method of computation should be sustained so long as it would result in a fair approximation of the amount of purely local or intrastate business for which the corporation was being taxed. If the formula or method of measuring the franchise tax would result in taxing the interstate or foreign business, as well as the purely intrastate business, the tax would be invalid and unconstitutional. *International Paper Company v. Commonwealth of Massachusetts*, 246 U. S. 135. In the case at bar, since the appellant Bridge Company is engaged exclusively in foreign commerce and has no power under its charter to engage in any other business, it cannot be subjected to this Michigan annual tax imposed upon corporations for the privilege of doing business for to do so would be to tax it for the privilege of doing foreign commerce.

The case at bar is different from the case of *Kansas City v. Stiles*, 242 U. S. 112, cited by appellee, in that in the case at bar appellant Bridge Company engages and has power to engage in no other business than that of foreign commerce, whereas in the case of *Kansas City v. Stiles*, the corporation is a consolidated corporation under the laws of Alabama and is engaged in both interstate and intrastate commerce. If the privilege tax in that case were for the privilege of doing business, it could have been validly imposed for the privilege of doing intrastate business. If it were imposed for the privilege of being or continuing to be a corporation, the corporation in that case being a domestic corporation under the consolidation statute, could be validly subject to the tax for that privilege. In the case at bar, the tax is imposed not for the privilege of "being" but for the

privilege of doing business, and appellant Bridge Company having no power to engage in any other business than that of foreign commerce, cannot be subject to the tax.

And likewise, the case of *Kansas City Ry. Co. v. Kansas,* 240 U. S. 227, is one where the privilege tax imposed by the State of Kansas upon a domestic corporation was for the privilege of being or continuing to be a corporation under the laws of that state. And in the case of *Ashley v. Ryan,* 153 U. S. 437, cited by appellee, the privilege tax imposed was one for the privilege of being or continuing to be a domestic corporation. The corporation in that case was consolidated under the laws of the State of Ohio, and the court held that if the corporation elected to obtain the privilege of being or existing as a body corporate, it would necessarily be required to submit to the conditions imposed by the state of the privilege granted by that state. If the Michigan tax were imposed for the privilege of being or continuing to be or exist as a corporation as the tax was in those cases, it would be in violation of the Michigan constitution under the ruling of *Union Steam Pump Sales Co. v. Secretary of State,* 216 Mich. 261, in that the proceeds of this tax are payable to a fund different than is required by the Michigan constitution if this were a tax upon the privilege of being or continuing to be or exist as a Michigan corporation. In the case at bar, the tax is not imposed by the state for the privilege of being or continuing to be or exist as a corporation, but rather is imposed for the privilege of doing business, and since the only business which is done or can be done under the charter of the appellant Bridge Company is that of foreign commerce, the appellant Bridge Company cannot be subjected to the tax.

The case of *Flint v. Stone, Tracy Co.*, 220 U. S. 142, cited by appellee, can have no present application. In that case it was held that Congress clearly had the power to impose a privilege tax upon all corporations doing business in this country. The question there in issue was whether or not the measure or the computation of the amount of tax to be imposed for the privilege could validly include otherwise tax exempt securities. In the case at bar, appellant contends that the tax cannot validly be imposed upon it at all, since it is engaged exclusively in foreign commerce. The method of measuring the tax is not here involved, but rather the power of the State of Michigan to impose this tax upon appellant corporation at all. In the case at bar it is clear that the power of the State of Michigan to regulate corporations is limited to the granting or taxing of the privilege of doing business within the State and it cannot regulate or tax the doing of foreign commerce by the corporation. Since appellant has no power to engage in any business other than that of foreign commerce, it cannot be subject to this tax.

Counsel for appellee on page 2, 3 and 10 of their brief, contend that the appellant Bridge Company has power to engage in other businesses than that of owning, operating and maintaining this highway bridge under their corporate charter. An examination of these claimed powers is set forth on page 2 and 3 of their brief, clearly demonstrates that they are merely in furtherance of the objects and purposes granted by the state, that is in furtherance of the business of owning and operating this international highway bridge. These other so-called powers to purchase, exchange and obtain real estate, to acquire stock in other corporations and to issue its own shares, bonds, debentures and notes, or other evidence to borrow money, and to guaranty bonds of the subsidiary

must be "incidental or appurtenant to or growing out of or connected with said purposes, objects and powers" of the corporation. The general powers and purposes of the corporation are to own and operate an international highway bridge. The other powers are only incidental to this express purpose and do not permit the corporation to engage in any other business not expressly provided for in the purpose clause of its charter. They do not permit the corporation, apart from its general powers, to engage in purely intrastate commerce, and are merely necessary incidents to its power and of its doing of this power of foreign commerce.

That the appellant Bridge Company has been engaged exclusively in foreign commerce, and its corporate powers are limited to the doing of this business exclusively, is discussed in our brief, pages 9 to 19. We merely wish to refer to a portion of the opinion of this court in the case of *Cleveland Railway Co. v. Backus*, 154 U. S. 439, bearing upon this question. Although that case involved the right of a state to impose a property tax, the court, in its opinion, considered the question of whether or not the imposition of a further burden or license or tax for the privilege of using, constructing or operating a bridge or other instrumentality of interstate commerce would be valid. Mr. Justice Brewer, speaking for the court, at page 446 said:

> "Take, for illustration, property whose sole use is for purposes of interstate commerce; such as a bridge over the Ohio between the states of Kentucky and Ohio. From that springs its entire value. Can it be that it is on that account entirely relieved from the burden of state taxation? Will it be said that the taxation must be based simply on the cost, when never was it held that the cost of a thing is the test of its value? Suppose there be two bridges over the Ohio, the cost

of the construction of each being the same,—one between Cincinnati and Newport, and another 20 miles below, and where there is nothing but a small village on either shore. The value of the one will, manifestly, be greater than that of the other, and that excess of value will spring solely from the larger use of the one than of the other. Must an assessing board in either state, assessing that portion of the bridge within the state for purposes of taxation, eliminate all of the value which flows from the use, and place the assessment at only the sum remaining? It is a practical impossibility. Either the property must be declared wholly exempt from State taxation, or taxed at its value, irrespective of the causes and uses which have brought about such value.

"And the uniform ruling of this court—a ruling demanded by the harmonious relations between the states and the national government—has affirmed that the full discharge of no duty intrusted to the latter restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. *All that has been decided is that beyond the taxation of property, according to the rule of ordinary property taxation, no state shall attempt to impose the added burden of license or other tax for the privilege of using, constructing, or operating any bridge, or other instrumentality of interstate commerce, or for the carrying on of such commerce.*"

CONCLUSION

It is respectfully submitted that the privilege tax here in question imposed by the State of Michigan upon corporations is for the privilege of doing interstate business. The appellant Bridge Company is engaged exclusively in foreign commerce. Under its charter it has

no power to engage in any other business than operating and maintaining this international bridge, the business of foreign commerce. If this tax is imposed for the privilege of doing business upon the Bridge Company, it is, therefore, and must be imposed upon it for the privilege of engaging exclusively in foreign commerce. And, clearly, to impose a tax upon a corporation for the privilege of engaging in foreign commerce, is in violation of the Commerce Clause of the United States Constitution. We respectfully submit that the judgment of the Supreme Court of Michigan should be reversed.

Respectfully submitted,

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